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No. 86-1191

In the Supreme Court of the United States

OCTOBER TERM, 1986

BOB WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in sustaining the district court's imposition of sanctions against him, under Rule 11 of the Federal Rules of Civil Procedure, for advancing unwarranted arguments on behalf of his client in the district court.

1. Petitioner's client, Susan P. Dalton, filed a 1983 federal income tax return on which she claimed a so-called "war tax credit" (Pet. App. 15a) based on her asserted conscientious objection to the use of tax payments for military expenditures. Dalton computed this "credit" as 55% of the tax liability that would otherwise have been due, or $834.90. On receipt of Dalton's return, the Internal Revenue Service assessed a $500 civil penalty under Section 6702 of the Internal Revenue Code.[1] Pet. App. 19a-21a. Section 6702, which was adopted in 1982 in order to deter the filing of "tax protest" returns (see 1 S. Rep. 97-494, 97th Cong., 2d Sess. 277-278 (1982)), authorizes the assessment of a civil penalty against any taxpayer who files what purports to be a tax return, but which fails to set

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

forth sufficient information "on which the substantial correctness of the self-assessment may be judged" or which "contains information that on its face indicates that the self-assessment is substantially incorrect." In order for the penalty to be applicable, the taxpayer's conduct must be due either to "a position which is frivolous" or to "a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws."

Thereafter, Dalton sought legal advice from petitioner, who is an attorney. Dalton paid a portion of the penalty, and petitioner then instituted on her behalf this refund suit in the United States District Court for the Western District of North Carolina.[2] The complaint alleged that Dalton's return was not frivolous within the meaning of Section 6702 and that, in any event, Section 6702 is unconstitutional (C.A. App. 4-6).

The government filed a motion to dismiss for lack of subject matter jurisdiction[3] or, alternatively, for summary judgment. In addition, the government sought an award of attorneys' fees as a sanction under Rule 11, Fed. R. Civ. P., and 28 U.S.C. 1927. See Pet. 10. In response, Dalton filed a cross-motion for summary judgment and renewed her request for attorneys' fees under Section 7430 of the Code (C.A. App. 41, 55-56).

The district court granted the government's motion for summary judgment, holding that Dalton's 1983 return was "frivolous as a matter of law" insofar as it claimed a credit

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[2] Ordinarily, full payment of an assessment is a prerequisite to the filing of a refund suit. See *Flora* v. *United States*, 357 U.S. 63 (1958), aff'd on rehearing, 362 U.S. 145 (1960). Section 6703(c)(1) of the Code, however, permits a refund suit to be brought to challenge a penalty imposed under Section 6702 after payment of only 15% of the penalty.

[3] The government contended that the suit was not timely because not brought within the time limits specified in Section 6703(c)(2), but both the district court (Pet. App. 22a-25a) and the court of appeals (*id.* at 3a-11a) rejected that contention.

based on her opposition to military expenditures (Pet. App. 25a). The district court further concluded that sanctions should be imposed upon petitioner under Rule 11, noting that both the statutory and the constitutional claims advanced by petitioner on Dalton's behalf were without merit (Pet. App. 27a-29a). Petitioner argued at a subsequent hearing that Rule 11 sanctions were inappropriate because he filed the suit in good faith, and because, at the time of filing, there existed no precedent directly on point in that district court, the Fourth Circuit, or this Court (see C.A. App. 73). Rejecting that argument, the district court found that Dalton and petitioner had committed "[a] flagrant abuse of the judicial process" by litigating the case (*id.* at 86; Pet. App. 34a). Accordingly, the court entered judgment against petitioner, awarding damages in the amount of $613.22 to compensate the government for salary and travel expenses (C.A. App. 83).

Both Dalton and petitioner appealed to the court of appeals, which unanimously affirmed the district court's judgment in all respects (Pet. App. 1a-17a). With respect to the Rule 11 sanctions that are the subject of the instant petition, the court found that a quick inquiry into the case law and legislative history would have brought petitioner to the conclusion that "[i]t was not reasonable to believe that [Dalton's] position was plausible" (*id.* at 16a). The court also emphasized that the arguments petitioner advanced on Dalton's behalf "had been uniformly rejected" by the courts (*ibid.*; see *id.* at 13a-16a). The court then imposed further sanctions against both Dalton and petitioner pursuant to Rule 38, Fed. R. App. P., for prosecuting a frivolous appeal from the district court's entry of summary judgment in the government's favor (Pet. App. 16a-17a). The government did not seek, and the court of appeals did not impose, Rule 38 sanctions with respect to petitioner's appeal from the district court's imposition of Rule 11 sanctions.

2. a. There is no merit to petitioner's contention (Pet. 15-32) that he was not subject to sanction under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 permits the district courts to award costs and fees against an attorney or *pro se* litigant for filing a pleading where a pre-filing inquiry would have indicated no basis for a good-faith assertion of the position taken therein. The Rule 11 standard, since its amendment in 1983, is one of objective reasonableness. See, *e.g.*, *Indianapolis Colts* v. *Mayor and City Council*, 775 F.2d 177, 181 (7th Cir. 1985).

Inquiry by petitioner into the meaning of Section 6702 would have indicated that Dalton's 1983 return fell squarely within its coverage. The Senate Report (1 S. Rep. 97-494, *supra*, at 278) stated that the penalty would apply, inter alia, whenever a taxpayer files:

> a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as * * * a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget * * *.

Thus, it clearly was Congress's intent to penalize the filing of returns like Dalton's. As of the date on which petitioner instituted this suit, the Fourth Circuit itself had not yet squarely considered the contentions that Section 6702 does not apply to returns claiming such "war tax" credits or, alternatively, that such an application of the statute would violate the First Amendment. But several other federal appellate courts had already rejected these claims as of that time. See *Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985); *Wall* v. *United States*, 756 F.2d 52 (8th Cir. 1985); *Welch* v. *United States*, 750 F.2d 1101 (1st Cir. 1985).[4]

[4] These courts have since been joined by the Ninth Circuit in *Franklet* v. *United States*, 761 F.2d 529 (1985), aff'g 578 F. Supp.

There is nothing in either the text or the underlying rationale of Rule 11 that insulates an attorney from sanctions for advancing a patently frivolous contention, simply because the precise contention has never before been raised in the same circuit.

b. Petitioner's objection in this Court to the Rule 11 sanctions is premised primarily on his assertion (Pet. 19-20) that he was entitled to rely on the district court decision in *Jenney* v. *United States*, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985), which held that Section 6702 penalties could not be imposed for filing a "war tax return" similar to Dalton's.[5] But even if one accepts petitioner's submission that the district court decision in *Jenney* justified this lawsuit and that he could not have been expected to know when he filed the complaint in this case that *Jenney* had been reversed on appeal a few days earlier, *Jenney* cannot possibly excuse the full course of petitioner's conduct in the trial court. The fact that *Jenney* had been reversed (as well as the existence of several other decisions rejecting his contentions) was brought to petitioner's attention in the government's mo-

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1552 (N.D. Cal. 1984), the Fourth Circuit in *McKee* v. *United States*, 781 F.2d 1043 (1986), cert. denied, No. 85-1676 (June 23, 1986), and the Sixth Circuit in *Collett* v. *United States*, 781 F.2d 53 (1985).

[5] In so holding, the district court in *Jenney* had relied upon the Senate Report's statement that "the penalty will not apply if the taxpayer shows the correct tax due but refuses to pay the tax" (1 S. Rep. 97-494, *supra*, at 278). As the Ninth Circuit explained in reversing *Jenney*, this statement clearly refers only to the situation where the taxpayer's "self-assessment," *i.e.*, the amount he lists on the return as tax due, is correct, not to the situation where (as here) the self-assessment is incorrect but an attached statement enables the IRS to supply the correct figure. The penalty applies if the return "contains information that on its face indicates that the amount of tax shown on the return is substantially incorrect" (1 S. Rep. 97-494, *supra*, at 277). See *Jenney* v. *United States*, 755 F.2d 1384, 1386 (9th Cir. 1985).

tion for summary judgment. At that point, petitioner did not relent in his prosecution of the suit but instead filed a new pleading, a cross-motion for summary judgment, based on the same completely unsupported arguments reflected in the complaint.[6] An aberrational district court decision that has been reversed on appeal cannot serve to insulate a contention indefinitely from being characterized as not "well grounded in * * * existing law" under Rule 11, and therefore the district court's imposition of sanctions here was fully justified.

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[6] For this reason, there is no merit to petitioner's suggestion (Pet. 30-32) that this case presents an opportunity to resolve an asserted conflict in the circuits on the question whether the filing of a complaint imposes a continuing Rule 11 duty on an attorney. The Second Circuit has stated that an attorney's conduct for Rule 11 purposes is tested as of the time the pleading is signed. *Oliveri* v. *Thompson*, 803 F.2d 1265, 1274-1275 (1986). The Fifth Circuit has stated that, with respect to factual matters, Rule 11 sanctions may be appropriate against an attorney who persists in prosecuting an action after he learns that an asserted position is no longer justifiable, even if the position was originally supported by adequate inquiry at the time the complaint was filed. See *Southern Leasing Partners* v. *McMullan*, 801 F.2d 783, 788 (1986). Whatever disagreement exists on this point in the courts of appeals, the question is not implicated here. The district court's imposition of Rule 11 sanctions did not rest on the proposition that petitioner's signing of the complaint imposed upon him a continuing duty to dismiss the complaint if he later learned that the position was unsupportable, *e.g.*, because *Jenney* was reversed on appeal. Petitioner filed another pleading, the cross-motion for summary judgment, *after* he was apprised that *Jenney* had been reversed, and the filing of that motion provided an independent basis for the imposition of Rule 11 sanctions. That is, even if one assumes arguendo that petitioner could avoid Rule 11 sanctions for filing the complaint based on his (mistaken) belief that *Jenney* had not been reversed at that time, there is no reason why the district court should have judged his later conduct in filing the cross-motion for summary judgment on the basis of his knowledge at the time he filed the complaint.

3. Petitioner contends (Pet. 28-30) that this Court should grant review to resolve a conflict in the circuits as to the appropriate standard of review of district court orders imposing Rule 11 sanctions. The Fourth Circuit has stated that such orders are reviewed under an "abuse of discretion" standard (*Cohen* v. *Virginia Electric & Power Co.*, 788 F.2d 247, 248 (1986)),[7] and the court of appeals here concluded that the district court "properly exercised its discretion" (Pet. App. 13a-14a). Other circuits have held that the question whether specific conduct violates Rule 11 is a legal question subject to de novo review on appeal.[8] This case presents no opportunity to resolve this asserted conflict, however, because the court of appeals would have reached the same result no matter what standard it applied. The court undertook an independent review of the relevant factors surrounding the imposition of sanctions, and it endorsed the district court's decision as being correct, not merely as being a permissible exercise of discretion (see Pet. App. 13a-16a). Indeed, the fact that the court concluded that the appeal on the merits was frivolous and accordingly imposed further sanctions under Rule 38 of the Federal Rules of Appellate Procedure leaves little room for doubt that the court of appeals would have affirmed the Rule 11 sanctions even on de novo review.[9]

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[7] Accord, *Southern Leasing Partners* v. *McMullan*, 801 F.2d 783, 787-788 (5th Cir. 1986); *Frazier* v. *Cast*, 771 F.2d 259, 262-263 (7th Cir. 1985).

[8] See *Golden Eagle Distributing Corp.* v. *Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986); *Eastway Construction Corp.* v. *City of New York*, 762 F.2d 243, 254 & n.7 (2d Cir. 1985); *Westmoreland* v. *CBS*, 770 F.2d 1168, 1175 (D.C. Cir. 1985).

[9] The Rule 38 sanctions were imposed because petitioner persisted on appeal in claiming that Section 6702 violates the First Amendment, even though he dropped his equally frivolous statutory argument. Rule 38 sanctions were not imposed for the portion of the appeal

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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challenging the imposition of Rule 11 sanctions (see Pet. App. 16a-17a). Petitioner lists the propriety of the imposition of Rule 38 sanctions in the statement of "Questions Presented" (Pet. ii), but he does not address this question in the body of the petition. We are aware of no basis for challenging the validity of the court of appeals' order in this regard.

Petitioner also lists in the "Questions Presented" the question whether he was given adequate notice of the district court's intention to consider Rule 11 sanctions (Pet. ii), but he does not address this issue in the body of the petition either. Any challenge on this ground is totally without foundation. The government made clear in its motion to dismiss or for summary judgment its view that such sanctions were in order here, and petitioner had a full and fair opportunity to address the matter in his response to that motion. Moreover, the court held a hearing on the question of the propriety of sanctions before entering final judgment awarding such sanctions; petitioner was given a full opportunity at that time to address the court and contest the imposition of sanctions (see C.A. App. 69-78).

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